PP lwn. MOHAMAD KHAIRUL HAPISZAN ABU BAKAR

MAHKAMAH TINGGI MALAYA, TEMERLOH
ROSLAN MAT NOR PK
[RAYUAN JENAYAH NO: CB-41LB-3-02-2022]
22 FEBRUARI 2023

Abstrak – *Mahkamah Rendah mesti mematuhi tatacara yang digariskan bawah s. 173 Kanun Tatacara Jenayah ('KTJ') dalam menjalankan perbicaraan. Kegagalan mematuhi tatacara bawah s. 173, tanpa apa-apa alasan yang mewajarkan ketakpatuhan tersebut, tidak boleh dibetulkan dengan s. 422 KTJ. Perbicaraan yang tidak mematuhi tatacara s. 173 KTJ adalah tidak sah di sisi undang-undang dan mewajarkan satu perbicaraan semula.*

PROSEDUR JENAYAH: *Pelepasan dan pembebasan – Rayuan – Rayuan oleh pihak pendakwaan – Majistret telah terlebih dahulu mendengar keterangan saksi pembelaan sebelum mendengar keterangan tertuduh – Tertuduh dilepaskan dan dibebaskan di akhir kes pembelaan – Sama ada perbicaraan mematuhi tatacara yang digariskan – Sama ada perbicaraan sah – Kanun Tatacara Jenayah, s. 173*

Responden telah dituduh di Mahkamah Majistret atas pertuduhan: (i) memiliki dadah jenis methamphetamine seberat 10.58g, satu kesalahan bawah s. 12(2) Akta Dadah Berbahaya 1952; dan (ii) memiliki racun jenis kafein tanpa kebenaran yang sah, satu kesalahan bawah s. 9(a) Akta Racun 1952. Walau bagaimanapun, di akhir kes pembelaan, Majistret melepaskan dan membebaskan responden. Maka timbul rayuan ini oleh pihak pendakwaan atas hujahan, antara lain, Majistret telah, terlebih dahulu, mendengar keterangan saksi pembelaan sebelum mendengar keterangan responden.

Diputuskan (membenarkan rayuan):

(1) Kanun Tatacara Jenayah ('KTJ') memperuntukkan agar mahkamah rendah mematuhi s. 173 semasa menjalankan perbicaraan. Seksyen 173 bertujuan menggalakkan perbicaraan yang pantas dengan mengecualikan formaliti yang tidak diperlukan serta mengelakkan kelewatan. Pematuhan terhadap tatacara perbicaraan terus bawah s. 173 oleh mahkamah rendah perlu diutamakan dan dipatuhi. Kegagalan mematuhi tatacara bawah s. 173 boleh menyebabkan kegalauan dalam prosiding hingga boleh menjejaskan keadilan terhadap tertuduh dan pihak pendakwaan. (perenggan 3, 4, 10 & 12)

(2) Seksyen 173(j)(iii) memperuntukkan agar seorang tertuduh memberi keterangan terlebih dahulu, sebelum saksi-saksi lain, semasa pembelaan. Dalam kes ini, responden telah dipanggil sebagai saksi ketiga kes

pembelaan, iaitu selepas saksi pembelaan pertama dan kedua memberi keterangan. Ini jelas dan nyata tidak mematuhi s. 173(j)(iii) KTJ dan menyebabkan perbicaraan kes tidak sah di sisi undang-undang. Tidak sesuai untuk membetulkan ketakpatuhan Majistret terhadap s. 173(j)(iii) KTJ dengan mengguna pakai s. 422 KTJ. Keputusan Majistret diketepikan; satu perbicaraan semula diperintahkan agar dijalankan di hadapan Majistret lain. (perenggan 23, 27, 28, 30 & 40)

Kes-kes yang dirujuk:
Awaluddin Suratman & Ors v. PP [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310 HC ***(dirujuk)***
Chee Chiew Heong v. PP [1981] CLJ 43; [1981] CLJ (Rep) 122 HC ***(dirujuk)***
Dato' Seri Anwar Ibrahim v. PP [2011] 2 CLJ 845 CA ***(dirujuk)***
Goh Tong v. PP [1953] 1 LNS 24 HC ***(dirujuk)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 SC ***(dirujuk)***
Kuppusamy v. PP [1941] 1 LNS 31 ***(dirujuk)***
PP v. Lim Chen Len [1981] 1 LNS 11 ***(dirujuk)***
Reid v. R [1980] AC 343 ***(dirujuk)***
Rex v. Howe [1926] 2 MC 109 ***(dirujuk)***
Sivalingam v. PP [1974] 1 LNS 157 HC ***(dirujuk)***
Tan Boon Hock v. PP [1978] 1 LNS 194 FC ***(dirujuk)***
Tengku Abdul Aziz v. PP [1951] 1 LNS 126 ***(dirujuk)***
Zahari Yeop Basri & Anor v. PP [1977] 1 LNS 162 HC ***(dirujuk)***

Perundangan yang dirujuk:
Criminal Procedure Code, ss. 173(j)(iii), 177A, 178, 180, 422

Criminal Procedure Code [India], ss. 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 262

Sumber-sumber yang dirujuk:
CS Sarkar, *Sarkar The Code of Criminal Procedure*, 2012, 10th edn, hlm 1365
NS Bindra's, *Interpretation of Statutes*, 8th edn, The Law Book Company (P) Ltd, 1997, hlm 83

Bagi pihak perayu - Nurul Balkis Zunaidi; TPR
Bagi pihak responden - Muhammad Firdaus Arshad; T/n Firdaus Arshad & Co

[Nota Pengarang: Rayuan dari Mahkamah Majistret; Kes Jenayah No: CI-83D-27-01-2019.]

Dilaporkan oleh Najib Tamby

PENGHAKIMAN

Roslan Mat Nor PK:

Pendahuluan

[1] Ini adalah rayuan Pendakwa Raya terhadap keputusan Majistret membebaskan dan melepaskan responden di akhir kes pembelaan. Responden telah dikemukakan dengan pertuduhan seperti berikut:

Pertuduhan Pertama

Bahawa kamu pada 02hb Oktober 2018, jam lebih kurang 4.35 pagi bertempat di rumah tidak bernombor Kampung Kechau Tui, Padang Tengku, di dalam daerah Kuala Lipis, dalam Negeri Pahang, telah didapati memiliki dadah berbahaya jenis "Methamphetamine" dengan berat bersih 10.58 gram. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 12(2) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s. 39A(1) Akta yang sama.

Pertuduhan Kedua

Bahawa kamu pada 02hb Oktober 2018, jam lebih kurang 4.35 pagi bertempat di rumah tidak bernombor Kampung Kechau Tui, Padang Tengku, di dalam daerah Kuala Lipis, dalam Negeri Pahang, tanpa kebenaran yang sah telah didapati memiliki racun jenis Caffeine. Oleh yang demikian kamu telah melakukan satu kesalahan di bawah s. 9(a) Akta Racun 1952 (Pindaan) 1983 dan boleh dihukum di bawah s. 32(2) Akta yang sama.

[2] Pendakwa Raya melalui petisyen rayuan yang difailkan di mahkamah mengasaskan rayuan kepada dua perkara utama iaitu:

(i) Majistret telah mendengar terlebih dahulu keterangan saksi pembelaan sebelum mendengar keterangan responden; dan

(ii) pembelaan yang dikemukakan oleh responden adalah pembelaan berbentuk pemikiran terkemudian.

Pematuhan Seksyen 173 Kanun Tatacara Jenayah (KTJ) Semasa Mengendalikan Perbicaraan Oleh Majistret

[3] Kanun Tatacara Jenayah (KTJ) memperuntukkan s. 173 bagi diikuti semasa menjalankan perbicaraan oleh mahkamah rendah. Ia dikenali dengan perbicaraan terus. Ia bagi membezakan antara perbicaraan jenayah di Mahkamah Tinggi di bawah s. 180 KTJ dengan perbicaraan di mahkamah rendah. Perbicaraan terus bukan bermaksud mahkamah boleh menjalankan perbicaraan tanpa mematuhi s. 173 KTJ. Dalam kes *Kuppusamy v. PP* [1941] 1 LNS 31; [1948] MLJ 25 Hakim Murray-Aynsley menyatakan seperti berikut:

Section 173 deals with the whole procedure of summary trials. Sub-sections (f) and (m) provide for the cases where the Magistrate may acquit the accused (g) and (n) provide for the discharge for the accused.

[4] Oleh itu pematuhan terhadap tatacara perbicaraan terus di bawah s. 173 KTJ oleh mahkamah rendah adalah perlu diutamakan dan dipatuhi. Mahkamah Rayuan dalam kes *Dato' Seri Anwar Ibrahim v. PP* [2011] 2 CLJ 845 semasa memutuskan berkenaan isu per. 8(1) Perlembagaan Persekutuan dan hubung kaitnya dengan prosedur perbicaraan jenayah di Mahkamah Tinggi telah menyatakan seperti berikut:

A [37] The short answer is this. Trials before the High Court are set out in Chapter XX of the Criminal Procedure Code (Act 593) ("CPC"). It is applicable throughout the country and the procedures are statutorily laid out. Chapter XX of the CPC contains ss. 178, 179, 180, 181, 182, 182A and 183 and these sections are worded in this way and they are self-explanatory.

B

[5] Seterusnya di perenggan 39 mahkamah menyatakan seperti berikut:

[39] The equality provision that is housed in art. 8(1) of the Federal Constitution had its antecedents in the English common law jurisprudence. Article 8(1) of the Federal Constitution owes its pedigree to art. 14 of the Indian Constitution and that, in turn, was inspired by the Fifth and Fourteenth Amendment of the United States Constitution. The word "law" that appears in art. 8(1) of the Federal Constitution must necessarily include procedural law and the procedural law in Chapter XX of the CPC is applicable to all accused persons and such a procedure is not arbitrary but fair. Procedural fairness includes the rules of natural justice and it is enshrined in Chapter XX of the CPC.

C

D

[6] Malahan jika dilihat kepada s. 173 KTJ sendiri menyatakan bahawa prosedur tersebut hendaklah diikuti. Ia menyatakan seperti berikut:

173 Procedure in summary trials

E The following procedure *shall be observed* by Magistrates in summary trials:

(a) ....

(b) ....

(c) ...

F (d) ...

(e) ...

(f) ...

(g) ...

G (h) ...

(ha) ...

(i) ...

(j) (i) If the accused pleads guilty to the charge as amended, the plea H shall be recorded and he may be convicted on it and the Court shall pass sentence according to law:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

I

(ii) If the accused does not plead guilty to the charge as amended, the accused shall be called upon to enter on his defence.

(iii) When the accused is called upon to enter on his defence, he may produce his evidence and shall be allowed to recall and cross-examine any witness present in the Court or its precincts:

Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided further that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(k) ...

(l) ...

(m) ...

(n) ...

(o) ... (penekanan ditambah)

[7] Sebaliknya penelitian kepada prosedur perbicaraan di Mahkamah Tinggi terdapat perbezaan frasa yang digunakan di bawah prosedur tersebut jika dibandingkan dengan s. 178 KTJ. Ia adalah seperti berikut:

178 Commencement of trial

(1) When the Court is ready to **commence the trial**, the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(2) If the accused pleads guilty the plea shall be recorded, and he may be convicted on it:

Provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

(3) If the accused refuses to plead or does not plead, or if he claims to be tried, the Court shall proceed to try the case.

179 Opening case for prosecution

(1) The officer conducting the prosecution shall open his case by stating shortly the nature of the offence charged and the evidence by which he proposes to prove the guilt of the accused.

(2) He shall then examine his witnesses, who may in turn be cross-examined for the defence and, if necessary, re-examined.

180 Procedure after conclusion of case for prosecution

(1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

181 Defence

(1) When the accused is called upon to enter on his defence he or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses, if any, and after their cross-examination and re-examination, if any, may sum up his case:

Provided always that if any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:

Provided also that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.

(2) The accused shall be allowed to examine any witness not previously named by him under the provisions of this Code if that witness is in attendance.

182 Reply

In all cases the officer conducting the prosecution shall have the right to reply on the whole case, whether the accused adduces evidence or not.

182A Procedure at the conclusion of the trial

(1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

183 Sentence

If the accused is convicted, the Court shall pass sentence according to law.

183A Victim's impact statement

(1) Before the Court passes sentence according to law under section 183, the Court shall, upon the request of the victim of the offence or the victim's family, call upon the victim or a member of the victim's family to make a statement on the impact of the offence on the victim or his family.

(2) Where the victim or a member of the victim's family is for any reason unable to attend the proceedings after being called by the Court under subsection (1), the Court may at its discretion admit a written statement of the victim or a member of the victim's family.

[8] Apa yang jelas perbezaan di antara ss. 173 dan 178 KTJ tersebut ialah tiada perkataan "commencement of trial" di bawah s. 173 seperti yang terdapat di bawah s. 178. Ini dapat difahami disebabkan di Mahkamah Tinggi perbicaraan akan hanya bermula setelah proses yang sewajarnya telah dilakukan seperti yang dikehendaki di bawah KTJ. Misalnya pemakaian s. 177A KTJ di mana kes daripada mahkamah rendah diangkat ke Mahkamah Tinggi untuk perbicaraan. Sebaliknya di mahkamah rendah perbicaraan bermula apabila pertuduhan dibacakan buat kali pertama di mahkamah sebelum pengakuan diambil oleh mahkamah rendah. Frasa "commencement of trial" membawa maksud semasa perbicaraan itu bermula dan bukannya pada kali pertama seseorang itu dihadapkan di mahkamah. Ini dinyatakan dalam kes *PP v. Lim Chen Len* [1981] 1 LNS 11; [1981] 2 MLJ 41 seperti berikut:

> The meaning of "commencement of the trial" is the commencement of the actual trial itself and not the date when the accused was first charged in court. (See decision of Court of Appeal in *Goh Tong v. Public Prosecutor* [1953] MLJ 251.

[9] Ia telah dinyatakan juga oleh CA Mathew, Ketua Hakim dalam kes *Goh Tong v. PP* [1953] 1 LNS 24; [1953] 1 MLJ 251 seperti berikut:

> The phrase '"commencement of the trial – is not technical. In lay English many a man pleads guilty to avoid a trial. In section 399 commencement necessarily means commencement of the contentious phase. In section 173 the phrase does not occur, but for the purposes of that section the trial begins with the framing of the charge which means, in practice, the approval by the Court of the draft charge entered beforehand by the prosecution.

[10] Penelitian kepada penghuraian s. 173 KTJ menunjukkan bahawa ia bertujuan untuk menggalakkan perbicaraan yang pantas dengan mengecualikan formaliti yang tidak diperlukan serta mengelakkan kelewatan. Ini dinyatakan dalam *The Annotated Statutes of Malaysia Criminal Procedure Code (Act 593) (Revised - 1999)* 1999 Issue Malayan Law Journal Sdn Bhd dan juga di dalam buku *Mallal's Criminal Procedure,* 7th edn, LexisNexis. Ia dinyatakan seperti berikut:

> It is a speedy trial dispensing with unnecessary formalities or delay.

Penelitian lanjut mendapati bahawa pandangan tersebut diambil daripada *Sarkar The Code of Criminal Procedure*, CS Sarkar, 10th edn, 2012 Vol. 2 di hlm. 1365 yang menyatakan seperti berikut:

> Summary trial is a speedy trial by dispensing with unnecessary formalities of delay.

Tinjauan Peruntukan Undang-Undang Berkenaan Perbicaraan Ringkas Di Bawah Bidang Kuasa Lain

Di India

[11] Namun demikian pandangan dalam *Sarkar The Code of Criminal Procedure* adalah berdasarkan kepada peruntukan Kanun Tatacara Jenayah (KTJ) India yang perlu dibezakan dengan kedudukan s. 173 KTJ. Seksyen 262 KTJ India menyatakan seperti berikut:

> **262. Procedure for summary trials.**
>
> (1) In trials under this Chapter, the procedure specified in this Code for the trial of summons-case shall be followed except as hereinafter mentioned.
>
> (2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

[12] Oleh itu mahkamah rendah semasa menjalankan perbicaraan jenayah hendaklah mematuhi dengan ketat s. 173 KTJ. Kegagalan mematuhi prosedur di bawah s. 173 KTJ tersebut boleh menyebabkan kegalauan di dalam prosiding sehingga boleh menjejaskan keadilan kepada pihak tertuduh dan Pendakwa Raya. Ini wajar dielakkan. Kepatuhan kepada tatacara perbicaraan terus amatlah perlu diberikan perhatian bagi mengelakkan daripada perbicaraan tersebut dianggap sebagai suatu salah bicara atau mistrial. Jika itu berlaku ia akan membuang masa kehakiman yang digunakan semasa perbicaraan dan ia akan menimbulkan ketidakadilan.

[13] Sementara itu, prosedur berkenaan dengan perbicaraan kes saman di hadapan Majistret terdapat di bawah s. 259 KTJ India seperti berikut:

Section 259. Power of Court to convert summons-cases into warrant-cases

When in the course of the trial of a summons-case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the Magistrate that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of warrant-cases, such Magistrate may proceed to re-hear the case in the manner provided by this Code for the trial of warrant-cases and may re-call any witness who may have been examined.

[14] Bidang kuasa untuk membicarakan kes melalui perbicaraan terus di India dinyatakan di bawah s. 260 KTJ India seperti berikut:

Section 260. Power to try summarily

(1) Notwithstanding anything contained in this Code:

(a) any Chief Judicial Magistrate;

(b) any Metropolitan Magistrate;

(c) any Magistrate of the first class specially empowered in this behalf by the High Court,

may, if he thinks fit, try in a summary way all or any of the following offences:

(i) offences not punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

(ii) theft, under section 379, section 380 or section 381 of the Indian Penal Code (45 of 1860), where the value of the property stolen does not exceed [two thousand rupees];

(iii) receiving or retaining stolen property, under section 411 of the Indian Penal Code (45 of 1860), where the value of the property does not exceed [two thousand rupees];

(iv) assisting in the concealment or disposal of stolen property, under section 414 of the Indian Penal Code (45 of 1860), where the value of such property does not exceed [two thousand rupees];

(v) offences under sections 454 and 456 of the Indian Penal Code (45 of 1860);

(vi) insult with intent to provoke a breach of the peace, under section 504, and [criminal intimidation punishable with imprisionment for a term which may extend to two years, or with fine, or with both], under section 506 of the Indian Penal Code (45 of 1860);

(vii) abetment of any of the foregoing offences;

(viii) an attempt to commit any of the foregoing offences, when such attempt is an offence;

(ix) any offence constituted by an act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871 (1 of 1871).

(2) When, in the course of a summary trial it appears to the Magistrate that the nature of the case is such that it is undesirable to try it summarily, the Magistrate shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by this Code.

[15] Tatacara perbicaraan kes saman di hadapan Majistret di India dapat dilihat di bawah ss. 251 hingga 259 KTJ India seperti berikut:

Section 251. Substance of accusation to be stated.

When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge.

Section 252. Conviction on plea of guilty.

If the accused pleads guilty, the Magistrate shall record the plea as nearly as possible in the words used by the accused and may, in his discretion, convict him thereon.

Section 253. Conviction on plea of guilty in absence of accused in petty cases.

(1) Where a summons has been issued under section 206 and the accused desires to plead guilty to the charge without appearing before the Magistrate, he shall transmit to the Magistrate, by post or by messenger, a letter containing his plea and also the amount of fine specified in the summons.

(2) The Magistrate may, in his discretion, convict the accused in his absence, on his plea of guilty and sentence him to pay the fine specified in the summons, and the amount transmitted by the accused shall be adjusted towards that fine, or where a pleader authorised by the accused in this behalf pleads guilty on behalf of the accused, the Magistrate shall record the plea as nearly as possible in the words used by the pleader and may, in his discretion, convict the accused on such plea and sentence him as aforesaid.

Section 254. Procedure when not convicted.

(1) If the Magistrate does not convict the accused under section 252 or section 253, the Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

(2) The Magistrate may, if he thinks fit, on the application of the prosecution or the accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application require that the reasonable expenses of the witness incurred in attending for the purposes of the trial be deposited in Court.

Section 255. Acquittal or conviction.

(1) If the Magistrate, upon taking the evidence referred to in section 254 and such further evidence, if any, as he may, of his own motion, cause to be produced, finds the accused not guilty, he shall record an order of acquittal.

(2) Where the Magistrate does not proceed in accordance with the provisions of section 325 or section 360, he shall, if he finds the accused guilty, pass sentence upon him according to law.

(3) A Magistrate may, under section 252 or section 255, convict the accused of any offence triable under this Chapter, which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons, if the Magistrate is satisfied that the accused would not be prejudiced thereby.

Section 256. Non-appearance or death of complainant.

(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

> Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may, dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

Section 257. Withdrawal of complaint.

If a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint against the accused, or if there be more than one accused, against all or any of them, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom the complaint is so withdrawn.

Section 258. Power to stop proceedings in certain cases.

In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

Section 259. Power of Court to convert summons-cases into warrant-cases.

When in the course of the trial of a summons-case relating to an offence punishable with imprisonment for a term exceeding six months, it appears to the Magistrate that in the interests of justice, the offence should be tried in accordance with the procedure for the trial of warrant-cases, such Magistrate may proceed to re-hear the case in the manner provided by this Code for the trial of warrant-cases and may re-call any witness who may have been examined.

[16] Oleh yang demikian, frasa perbicaraan terus di bawah KTJ di India perlu dilihat dalam konteks KTJ di India dan tidak sewajarnya dicampur aduk dengan prosedur perbicaraan terus di bawah s. 173 KTJ. Ini adalah sejajar dengan penyataan di dalam kes *Kuppusamy* (*supra*) dan *Dato' Seri Anwar Ibrahim* (*supra*).

[17] Penelitian juga mendapati bahawa terdapat peruntukan khusus berkenaan dengan perbicaraan di Mahkamah Sesyen di India yang dinyatakan di bawah ss. 225 hingga 237 iaitu di Bahagian XVIII. Sementara itu di negara ini s. 173 KTJ juga terpakai kepada perbicaraan jenayah di Mahkamah Sesyen. Ini adalah disebabkan Mahkamah Majistret telah ditakrifkan termasuk Mahkamah Sesyen. Ini dinyatakan oleh Mahkamah Rayuan dalam kes *Tengku Abdul Aziz v. PP* [1951] 1 LNS 126; [1951] 1 MLJ 185 di mana Foster Sutton, Ketua Hakim menyatakan seperti berikut:

> In our opinion, the combined effect of the second schedule to the Criminal Procedure (Amendment) Ordinance, 1947, and section 61 of the Courts Ordinance, 1948, is to make the procedure laid down by section 173 of the Criminal Procedure Code for summary trials by Magistrates applicable to summary trials in the Sessions Courts.

[18] Ia juga dinyatakan oleh Mahkamah Agong dalam kes *Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183; [1991] 2 MLJ 544.

> Section 173 of the Code stipulates the whole procedure in summary trials in the subordinate courts including magistrate courts.

Di Singapura

[19] Secara perbandingannya, jika dirujuk kepada KTJ di Singapura hanya terdapat satu peruntukan sahaja berkenaan dengan perbicaraan jenayah di semua mahkamah tanpa menyatakan prosedur perbicaraan terus. Ia adalah seperti berikut:

Procedure at trial

230. (1) The following procedure must be complied with at the trial in all courts:

(a) at the commencement of the trial, the charge must be read and explained to the accused and the accused's plea taken;

(b) if the accused pleads guilty to the charge, the court must follow the procedure set out in Division 3 of Part 11;

(c) if the accused refuses to plead or does not plead or claims trial, the court must proceed to hear the case;

(d) the prosecutor may open the prosecutor's case and state shortly the nature of the offence with which the accused is charged and the evidence by which the prosecutor proposes to prove the guilt of the accused;

(e) the prosecutor must then examine the prosecutor's witnesses (if any) and each of them may in turn be cross-examined by the accused and every co-accused, after which the prosecutor may re-examine them;

(f) after the prosecutor has concluded the prosecutor's case, the defence may invite the court to dismiss the case on the ground that there is no case to answer and the prosecutor may reply to the submission;

(g) the court may alter the charge or frame a new charge before calling on the accused to give the accused's defence and if the court does so, the court must follow the procedure set out in sections 128 to 131;

(h) if the accused pleads guilty to this altered or new charge, the court must follow the procedure set out in Division 3 of Part 11;

(i) if the accused refuses to plead or does not plead or claims trial to the altered or new charge, the court must proceed in accordance with the procedure set out hereinafter;

(j) if after considering the evidence referred to in paragraph (e), the court is of the view that there is some evidence which is not inherently incredible and which satisfies each and every element of the charge as framed by the prosecutor or as altered or framed by the court, the court must call on the accused to give the accused's defence;

(k) the court must order a discharge amounting to an acquittal if it is of the view that there is no such evidence as referred to in paragraph (j);

(l) nothing in paragraphs (j) and (k) prevents any court from acquitting the accused at any previous stage of the case if, for reasons to be recorded by the court, it considers the charge to be groundless;

(m) before the accused calls any evidence in the accused's defence, the court must inform the accused that the accused will be called upon by the court to give evidence in the accused's own defence and what the effect will be if, when so called on, the accused refuses to give evidence on oath or affirmation; and the court may inform the accused in the following terms:

> I find that the prosecution has made out a case against you on the charge(s) on which you are being tried. There is some evidence, not inherently incredible, that satisfies each and every element of the charge(s). Accordingly, I call upon you to give evidence in your own defence.
>
> You have 2 courses open to you. First, if you elect to give evidence you must give it from the witness box, on oath or affirmation, and be liable to cross-examination. Second, if you elect not to give evidence in the witness box, that is to say, remain silent, then I must tell you that the court in deciding whether you are guilty or not, may draw such inferences as appear proper from your refusal to give evidence, including inferences that may be adverse to you.
>
> Let me also say, whichever course you take, it is open to you to call other evidence in your own defence. You may confer with your counsel on the course you wish to take.
>
> I now call upon you to give evidence in your own defence. How do you elect?;

(n) after the court has called upon the accused to give the accused's defence, the accused may:

(i) plead guilty to the charge, in which event the court must follow the procedure set out in Division 3 of Part 11; or

(ii) choose to give the accused's defence;

(o) when the accused is called on to begin the accused's defence, the accused may, before producing the accused's evidence, open the accused's case by stating the facts or law on which the accused intends to rely and make such comments as the accused thinks necessary on the evidence for the prosecution;

(p) if the accused is giving evidence in the accused's own defence, the evidence must be taken in the following order;

(q) an accused may apply to the court to issue process for compelling the attendance of any witness for the purpose of examination or cross-examination or to produce any exhibit in court, whether or not the witness has previously been examined in the case;

(r) the court must issue process unless it considers that the application made under paragraph (q) should be refused because it is frivolous or vexatious or made to delay or frustrate justice and in such a case the court must record the reasons for the order;

(s) before summoning any witness pursuant to an application under paragraph (q), the court may require that the witness's reasonable expenses incurred in attending the trial be deposited in court by the defence;

(t) at the close of the defence case, the prosecution has the right to call a person as a witness or recall and re-examine a person already examined, for the purpose of rebuttal, and such witness may be cross-examined by the accused and every co-accused, after which the prosecutor may re-examine the witness;

(u) at the close of the defence case, the accused may sum up the accused's case;

(v) the prosecution has the final right of reply on the whole case;

(w) if the court finds the accused not guilty, it must order a discharge amounting to an acquittal, and must, provided no other charge is pending against the accused, forthwith release the accused;

(x) if the court finds the accused guilty, it must record a conviction and comply with the procedure in section 228 after which it must pass sentence in accordance with the law.

(2) Where a witness, other than an accused, is giving evidence for the prosecution or the defence, the court may, on the application of either party, interpose that witness with any other witness if the court is of the view that there are good reasons to do so.

[20] Penelitian kepada peruntukan di Singapura dan India tersebut menunjukkan bahawa perbicaraan terus di dalam sistem perundangan jenayah di Malaysia adalah berbeza dengan bidang kuasa yang lain. Dalam sistem perundangan jenayah negara ini terdapat peruntukan khusus berkenaan perbicaraan terus di bawah s. 173 KTJ yang memperincikan tatacara perbicaraan jenayah di mahkamah rendah. Ia perlu dipatuhi sepenuhnya.

[21] Secara ringkasnya, tatacara perbicaraan terus di bawah s. 173 KTJ bolehlah dirumuskan di dalam gambar rajah berikut:

CARTA RINGKASAN PERBICARAAN TERUS
DI MAHKAMAH RENDAH
Pertuduhan dibacakan kepada
Orang Kena Tuduh (OKT)
OKT Mengaku Salah
- Fakta dibacakan;
- Barang kes dikemukakan;
- Disabitkan;
- OKT mengemukakan rayuan peringanan hukuman;
- Pendakwa Raya mengemukakan pemberatan hukuman;
- Hukuman.
OKT Tidak Mengaku Salah
(1) Kes Pendakwaan:
Saksi-saksi beri keterangan melalui:
(a) Pemeriksaan Utama oleh Pendakwa Raya.
(b) Pemeriksaan Balas oleh OKT/ Peguamnya.
(c) Pemeriksaan Semula Pendakwa Raya.
(2) Hujah oleh Pendakwa Raya dan Peguam OKT:
Tiada Kes Prima facie
- OKT dibebaskan dan dilepaskan.
Kes Prima Facie
OKT ada tiga (3) pilihan iaitu:
(a) Berdiam diri;
(b) Memberi keterangan dari kandang salah;
(c) Memberi keterangan secara bersumpah;
Jika OKT memilih (c), OKT akan memberi keterangan terlebih dahulu dan seterusnya diikuti saksi-saksi yang akan melalui proses:
(i) Pemeriksaan Utama oleh OKT/ Peguamnya;
(ii) Pemeriksaan Balas oleh Pendakwa Raya;
(iii) Pemeriksaan Semula oleh OKT/ Peguamnya;
(3) Hujah OKT/Peguamnya dan Pendakwa Raya
(4) Mahkamah putuskan OKT menimbulkan keraguan yang munasabah atau tidak terhadap kes pendakwaan;
(5) OKT dibebaskan sekiranya berjaya menimbulkan keraguan yang munasabah;
(6) OKT disabitkan sekiranya gagal menimbulkan keraguan yang munasabah;
(7) Rayuan peringanan hukuman oleh OKT/ Peguamnya jika disabitkan kesalahannya;
(8) Rayuan pemberatan hukuman oleh Pendakwa Raya;
(9) Mahkamah akan menjatuhkan hukuman mengikut undang-undang.

[22] Walau bagaimanapun, perincian gambar rajah di atas adalah ringkasan kepada prosedur yang boleh diperolehi daripada s. 173 KTJ tersebut. Penelitian terperinci kepada s. 173 KTJ dan rujukan kepada keputusan-keputusan mahkamah yang mentafsirkan peruntukan-peruntukan tersebut perlu dilakukan bagi mendapat kefahaman yang menyeluruh terhadap peruntukan s. 173 KTJ tersebut. Gambar rajah di atas hanyalah bertujuan untuk memudahkan kefahaman proses perbicaraan terus.

Pemakaian Seksyen 173(j)(iii) KTJ

[23] Seksyen 173(j)(iii) KTJ terdapat peruntukan berikut:

> (j) (iii) When the accused is called upon to enter on his defence, he may produce his evidence and shall be allowed to recall and cross-examine any witness present in the Court or its precincts:
>
> *Provided that if the accused elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence:*
>
> *Provided further that any accused person who elects to be called as a witness may be cross-examined on behalf of any other accused person.*
> (penekanan ditambah)

[24] Seksyen 173(j)(iii) KTJ ini diperkenalkan melalui pindaan KTJ pada tahun 1997 Akta A979 berkuat kuasa 31 Januari 1997. Ia berdasarkan pindaan yang diperkenalkan di Dewan Rakyat pada 18 Disember 1996. Ia adalah pindaan dibuat bersekali dengan pindaan kepada s. 173 yang berkaitan dengan penjelasan frasa *prima facie* di dalam KTJ. Ia dinyatakan seperti berikut:

> Pindaan bagi maksud penyeragaman ini juga dicadangkan kepada perenggan (g) s. 173 supaya jika orang tertuduh dipanggil membela dirinya di Mahkamah Rendah, dan dia memilih untuk memberikan keterangan sebagai saksi, keterangannya hendaklah diberikan dahulu sebelum dia memanggil orang lain. Pindaan ini terkandung dalam fasal 2(f).

[25] Sebelum pindaan tersebut tiada sebarang peruntukan yang memerlukan tertuduh memberi keterangan terlebih dahulu semasa pembelaan. Ini berlaku misalnya dalam kes *Sivalingam v. PP* [1974] 1 LNS 157; [1974] 2 MLJ 27 seperti berikut:

> At the hearing of the application counsel refers to the word "shall" appearing in the second line of sub-paragraph (j) of section 173 of the Criminal Procedure Code and it is his contention that it is mandatory for the accused to give evidence first in the witness box before any other defence witness is called to testify. Suffice to say that there is no merit in this argument as that paragraph merely sets out the procedure for the accused to state his defence and the requirement does not go beyond that the court shall ask the accused to state his defence. The procedure contended by counsel for the applicant is neither supported by sub-paragraph (j) expressly nor by necessary implication.

[26] Seksyen 173(j)(iii) terdapat suatu peruntukan ketentuan (proviso) yang perlu diberikan perhatian. Kedudukan ketentuan (proviso) di dalam satu undang-undang perlu ditafsirkan seperti dinyatakan dalam *Interpretation of Statutes*, 8th edn, NS Bindra's, The Law Book Company (P) Ltd, 1997 di hlm. 83 seperti berikut:

> It is settled law that the proviso and the main part of the Act or Rule are to be harmoniously read together and interpreted to give effect to the object of the provision.
>
> As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule. But provisos are often added not as exceptions or qualification to the main enactment but as saving clauses, in which cases they will not be construed as controlled by the section. Saving clauses are seldom used to construe Acts. These clauses are introduced into Acts which repeal others, to safeguard right which, but for the savings would be lost.
>
> Strict construction. ... It is a rule of law that a proviso should receive a strict construction. It is not open to the Court to add words to a proviso with a view to enlarge the scope of the proviso. The proviso must be restricted to the scope reasonably conveyed by the words used therein. But the strict construction may be deviated from by ascertaining the legislative intention. But a proviso or an exception cannot be so interpreted as to nullify or modify the main provision, or to defeat the basic intent expressed in the substantive provision.

[27] Dalam kes ini mahkamah mendapati bahawa responden telah dipanggil sebagai saksi ketiga kes pembelaan. Ia dilakukan setelah saksi pembelaan pertama dan kedua telah memberi keterangan. Ia adalah jelas dan nyata bahawa pembelaan kes tersebut telah dibuat tanpa mematuhi s. 173(j)(iii) KTJ. Adalah didapati bahawa bantahan oleh pihak Timbalan Pendakwa Raya hanya dibuat setelah tertuduh ingin memberikan keterangan beliau. Ia tidak dibuat pada awal kes pembelaan. Mahkamah Majistret telah memutuskan untuk meneruskan dengan mendengar keterangan saksi ketiga tersebut.

[28] Pihak pembelaan telah mengemukakan saksi-saksinya semasa pembelaan. Ia bukan sahaja kekhilafan pembelaan di dalam mengemukakan saksi-saksi tersebut. Ini adalah disebabkan mahkamah berkewajipan untuk memastikan bahawa perbicaraan yang dijalankan adalah teratur dan mengikut tatacara yang diperuntukkan di bawah s. 173 KTJ tersebut. Kegagalan mahkamah memastikan kepatuhan tersebut telah menyebabkan kehendak s. 173 KTJ yang sewajarnya digunakan oleh Majistret dalam perbicaraan terus tidak dipatuhi. Oleh itu, mahkamah berpendapat bahawa perbicaraan sedemikian adalah menyalahi undang-undang. la menyebabkan kes tersebut perbicaraan adalah tidak sah di sisi undang-undang.

Pemakaian Seksyen 422 KTJ

[29] Peguam responden yang bijaksana di dalam hujahan menyatakan bahawa sekiranya terdapat ketidakpatuhan terhadap s. 173(j)(iii) KTJ, ia boleh diperbetulkan dengan menggunakan s. 422 KTJ. Seksyen 422 KTJ memperuntukkan seperti berikut:

> **422 Irregularities not to vitiate proceedings**
>
> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of-
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[30] Mahkamah ini berpendapat bahawa ketidakpatuhan kepada prosedur yang telah ditetapkan secara bertulis tanpa sebarang alasan yang dapat dilihat di dalam nota keterangan bagi mewajarkan ketidakpatuhan tersebut bukannya alasan yang boleh digunakan bagi pemakaian s. 422 KTJ. Jika ini dilakukan ia akan menyebabkan peruntukan-peruntukan tersurat di dalam s. 173 KTJ akan dengan mudah diketepikan dan tidak dipatuhi oleh mahkamah yang menjalankan perbicaraan terus. Ia akan menjadikan s. 173 KTJ tersebut adalah tidak bermakna dan ia mungkin akan menimbulkan ketidakadilan dan kezaliman kepada tertuduh dan Pendakwa Raya. Oleh itu mahkamah berpendapat di dalam kes ini tidak sesuai bagi membetulkan ketidakpatuhan Majistret terhadap s. 173(j)(iii) KTJ dengan mengguna pakai s. 422 KTJ.

Adakah Mahkamah Boleh Memerintahkan Supaya Perbicaraan Semula Dilakukan?

[31] Dalam kes ini responden telah dibebaskan dan dilepaskan. Ini bermakna sekiranya perintah mahkamah untuk membicarakan semula kes ini diberikan ia akan memprejudiskan pihak responden. Hakikatnya, pembebasan responden tersebut telah dilakukan dalam satu perbicaraan yang tidak sah. Penelitian keterangan menunjukkan bahawa responden telah dituduh pertama kali di Mahkamah Majistret pada 17 Januari 2019. Penelitian kepada kertas pertuduhan kesalahan dilakukan oleh responden pada 2 Oktober 2018. Responden dibebaskan dan dilepaskan pada 25 Januari 2022. Ini bermakna bahawa dari tarikh kesalahan dilakukan sehingga responden dibebaskan dan dilepaskan ia mengambil masa lebih kurang tiga

tahun tiga bulan. Halnya berbeza sekiranya tertuduh telah disabitkan dengan perbicaraan yang tidak sah maka mahkamah boleh memutuskan antara lain, untuk membebaskan tertuduh daripada pertuduhan tersebut. Ini adalah disebabkan sabitan tersebut telah dibuat secara tidak sah.

[32] Sebaliknya dalam kes ini responden telah dibebaskan di akhir kes pembelaan. Ini bermakna Mahkamah Majistret telah memutuskan bahawa terdapat satu kes *prima facie* di akhir kes pendakwaan. Adakah dengan memerintahkan supaya perbicaraan semula dilakukan ia akan menjejaskan hak responden. Adakah perbicaraan semula akan memberi peluang kedua kepada pihak pendakwaan untuk membuktikan kesnya. Mahkamah berpendapat fakta bahawa responden telah dipanggil membela diri di akhir kes pendakwaan menunjukkan bahawa terdapatnya keterangan-keterangan terhadap responden yang mencukupi untuk dipanggil membela diri. Jika perbicaraan semula diperintahkan ia tidak memprejudiskan pihak responden. Ini adalah disebabkan apabila perbicaraan semula diperintahkan keterangan-keterangan akan didengar semula oleh Majistret yang lain dan dinilai keterangan tersebut.

[33] Ini bermakna bahawa semasa perbicaraan semula tersebut dilakukan pada akhir kes pendakwaan Majistret yang baharu akan menilai dan membuat dapatan berdasarkan keterangan yang dikemukakan di hadapan mahkamah. Begitu juga Majistret yang baharu perlu memastikan bahawa prosedur perbicaraan dipatuhi seperti yang dinyatakan di bawah s. 173(j)(iii) KTJ tersebut dan membuat dapatan yang sewajarnya. Apa yang penting dalam kes ini ialah keadilan perlu ditegakkan dan pematuhan kepada prosedur perbicaraan perlu dipatuhi.

[34] Ketidakpatuhan kepada prosedur yang telah ditetapkan oleh undang-undang bertulis akan menjadikan prosedur tersebut tidak bermakna dan hanya menjadi harimau kertas yang tidak mempunyai keupayaan dan dengan mudah akan diperlecehkan oleh pihak yang terlibat dalam perbicaraan jenayah dan ia akan menimbulkan ketidakadilan.

[35] Mahkamah juga merujuk kepada *Tan Boon Hock v. PP* [1978] 1 LNS 194; [1979] 1 MLJ 236 seperti berikut:

> Section 316(b) of the Criminal Procedure Code states that at the hearing of the appeal the judge may dismiss the appeal or, if he considers there is sufficient ground for interfering, he may '(b) in an appeal from a conviction or in an appeal as to sentence (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried or committed for trial; or (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence.'
>
> Under the provisions in allowing an appeal against conviction, an appellate court may reverse the finding and sentence and make any of the following orders:

(a) acquit the accused; or

(b) discharge the accused; or

(c) order accused to be retried; or

(d) order accused to be committed for trial.

As appellant was charged with an offence unknown to law, the prosecution could not support the conviction. An appeal against conviction lays open the whole case before the appellate court. The conviction was clearly wrong in law. By quashing the conviction and setting aside the judgment the appellate court was clearly following the provisions of section 316(b), that is, reversing the finding and sentence. The power of an appellate court to order a retrial on a proper charge before another magistrate when it is of the opinion that an accused was convicted on a wrong charge is discretionary. In the present case since it was held there was no proper charge ordering a retrial is most appropriate. The learned judge has exercised his discretion properly.

The appellate jurisdiction of the High Court is clear. The learned judge was right to quash the conviction, order a retrial before another magistrate and release appellant on bail to appear before the magistrate on a proper charge.

[36] Mahkamah juga merujuk kepada kes *Reid v. R* [1980] AC 343 seperti berikut:

The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or his summing up to the jury. There are, of course, countervailing interests of justice which must also be taken into consideration. The nature and strength of these will vary from case to case. One of these is the observance of a basic principle that underlines the adversary system under which criminal cases are conducted in jurisdictions which follow the procedure of the common law: it is for the prosecution to prove the case against the defendant. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing up to the jury. He is entitled, if he considers it appropriate, himself to put questions to the witness to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way.

It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the defendant, if a new trial were ordered in cases where at the original trial the evidence which the

A prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the defendant to trial had failed to adduce sufficient B evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case – and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under section C 14(2) of the Judicature (Appellate Jurisdiction) Act. In the United States of America where new trials in criminal cases are a commonplace a similar distinction between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence, and cases where the verdict has been set aside on other grounds, had been drawn by the Supreme Court of the United States. In the former class of case a new D trial is not to be ordered in either the federal or the state jurisdictions: *Burks v. United States* (1978) 98 S.Ct. 2141 and *Greene v. Massey* (1978) 98 S.Ct. 2151.

[37] la telah diterima pakai oleh Mahkamah Tinggi dalam kes *Chee Chiew Heong v. PP* [1981] CLJ 43; [1981] CLJ (Rep) 122; [1981] 2 MLJ 287. E Mahkamah juga perlu mengambil kira sama ada keadaan kes ini sesuai untuk perbicaraan semula diberikan. Ini berpandukan kepada garis panduan yang dikemukakan YAA Murison CJ dalam kes *Rex v. Howe* [1926] 2 MC 109 seperti berikut:

F I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have, entirely through their own fault, failed to present their case properly. If I complied with this petition, it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason, that the prosecution had not used all their available armoury in launching the first prosecution. Even in a civil case no re-trial can be obtained on the ground that new G evidence can be produced, unless it is shown that such evidence could not have been produced at the first trial. And the rule, I imagine, is much stricter in criminal than in civil proceedings.

Without such a rule it seems to me there would be no finality to litigation, and the prosecutor might initiate a series of prosecutions on the same charge bringing his evidence piece-meal in each successive case until, in H the end, all evidence was exhausted.

[38] Panduan ini telah diterima pakai oleh Mahkamah Tinggi dalam kes *Zahari Yeop Basri & Anor v. PP* [1977] 1 LNS 162; [1980] 1 MLJ 160. Dalam kes tersebut perintah perbicaraan semula tidak dibenarkan berdasarkan I kepada fakta bahawa perbicaraan telah bermula sejak 1973 dan adalah tidak adil ia dimulakan semula. Ini dapat dilihat melalui penghakiman hakim Hashim Yeop A Sani seperti berikut:

> It is to be noted also that although the appellants were convicted on April 16, 1976 the trial of both the appellants commenced since October 19, 1973 and the date the offence was alleged to have been committed was January 13, 1973. Under the circumstances I am of the opinion that the ends of justice do not require that the appellants should be put on trial again. There will therefore be no order of retrial.

[39] Sebaliknya dalam kes *Awaluddin Suratman & Ors v. PP* [1991] 3 CLJ 2459; [1991] 2 CLJ (Rep) 310, Mahkamah Tinggi telah memutuskan untuk diadakan perbicaraan semula setelah mendapati bahawa perbicaraan tersebut adalah suatu salah bicara ekoran daripada kegagalan mahkamah untuk memaklumkan kes pendakwaan kepada tertuduh yang tidak diwakili semasa perbicaraan.

Keputusan Akhir

[40] Mahkamah mengenepikan keputusan Majistret dan memerintahkan perbicaraan semula dijalankan di hadapan Majistret yang lain.